SUPREME COURT, U. S.

MAR 1

JOHN F. DAVIS

No. 1015

In the

Supreme Court of the United States

OCTOBER TERM, 1967.

WILLIAM C. WITHERSPOON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS, Sheriff of Cook County, Illinois,

Respondents.

BRIEF OF THE ILLINOIS DIVISION, AMERICAN CIVIL LIBERTIES UNION, AS AMICUS CURIAE

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BRIEF OF THE ILLINOIS DIVISION, AMERICAN CIVIL LIBERTIES UNION, AS AMICUS CURIAE

Now comes the Illinois Division of the American Civil Liberties Union, by its attorney, Elmer Gertz, and pursuant to leave of court granted January 15, 1968, files the within brief as amicus curiae.

THE INTEREST OF AMICUS CURIAE ARISES FROM THE FACT THAT EVERY ASPECT OF CAPITAL PUNISHMENT, INCLUDING THE CHALLENGE OF JURORS, IS A CIVIL LIBERTIES ISSUE.

The American Civil Liberties Union is an organization dedicated to the preservation of a free and open society, principally through the protections embodied in the Bill of Rights and the Fourteenth Amendment to the Constitution of the United States. The Illinois Division is one

of the larger constituent bodies and shares with the national organization its concern for constitutional liberties.

It is probably because of the activities of the Illinois Division that the American Civil Liberties Union has taken the position in recent years that capital punishment is a civil liberties issue. The process by which the Illinois Division and the national organization reached this conclusion should be examined in the light of the argument hereinafter advanced.

Even with the limitations of the issue by this Court, capital punishment must be examined, not as if it were one among many punishments society chooses to impose upon its offenders, but one awful in contemplation and irrevocable in result. In Illinois in this Twentieth Century, there have been at least four verified cases of innocent persons being convicted of murder. Lloyd Eldon Miller was within seven hours of execution, a reprieve having been refused by the Governor and the State Supreme Court.

In March, 1965, a special committee of the Illinois Division presented to the Board a survey of murder and capital punishment in Illinois, which was the result of much effort by many persons. (It is available only in manuscript form.) *Immutable Judgment: Murder and Capital Punishment In Illinois—A Survey. (March, 1965)*

Willard J. Lassers, the Chairman of the committee, is the attorney who subsequently appeared before this Court in behalf of Lloyd Eldon Miller. (*Miller* v. *Pate,* 386 U.S. 1, 87 S. Ct. 785 (1967). The committee enlisted the aid of both proponents and opponents of capital punishment, including Virgil Peterson, Operating Director of the Chicago Crime Commission; the Honorable John S. Boyle, Chief Justice of the Circuit Court of Cook County and a former State's Attorney of Cook County; Benjamin

Adamowski, another former State's Attorney of Cook County; Mr. J. Edgar Hoover, Director of the Federal Bureau of Investigation; Chicago Superintendent of Police O. W. Wilson, and others. The committee studied every reported Illinois murder case for the period between 1950 and 1963 in which death sentences were imposed, including those eleven cases in which the sentence was actually carried out and those in which another result ensued. (There have been no executions in Illinois since August, 1962, but twenty persons are presently under sentence of death.) In addition, the Committee examined by a special process of selection, fifty cases of individuals tried for murder in Illinois whose cases were reviewed by the Supreme Court of Illinois from January 1, 1950 to the summer of 1964. These were cases in which the death sentence had not been imposed. The findings of the committee, as stated in the report, which led amicus to take the stand it urges herein, are summarized in Appendix "A" to this brief.

For the reasons cited in this report, and others, the Illinois Division of the American Civil Liberties Union concluded that the death penalty is a civil liberties issue and after due deliberation the National Board of the American Civil Liberties Union concurred. The issue to be considered herein must be viewed in the context of what has been said about the A.C.L.U. viewpoint.

SUMMARY OF THE ARGUMENT

All studies which have been made show that the people of this country are steadily becoming more and more opposed to the death penalty. The President's Commission on Law Enforcement and Administration of Justice concluded, in 1967, all members agreeing, that the present

situation in the administration of the death penalty in many States is intolerable. A report of the Department of Economic and Social Affairs of the United Nations finds that in this country the death penalty is imposed upon members of racial and religious minorities with a frequency out of proportion to the capital crimes committed by members of such minorities. This report further finds that the death penalty is not a deterrent to the commission of murder, and a large majority of the leading authorities in the penal and social sciences favor the abolition of capital punishment.

Every reliable poll of public opinion in the United States shows a marked decline of those in favor of the death penalty, with a resultant increase in those who definitely oppose this penalty, an increasing majority. These polls further indicate that those who are most likely to understand the defendant charged with murder are those who are opposed to the death penalty and thus excluded from serving upon his jury.

Illinois and every other state where the death penalty is not mandatory leaves it to the unfettered discretion of the jury to determine when the death penalty is appropriate. The courts flatly refuse to give the jury any guidelines to follow in capital cases, due to the fact that the courts themselves are given no guidelines in making this determination. All that the court may instruct the jury is that they have complete discretion in deciding upon the penalty to be inflicted. The discretion of the jury or trial court judge will not be reviewed upon appeal unless it clearly shows a great departure from the spirit of the law or that the penalty is manifestly out of proportion to the nature of the offense.

In Illinois, as elsewhere, the Governor is given the exclusive power, by the State Constitution, to commute sen-

tences. As in the case with jurors and judges in imposing penalties, no standards are given to the Governor to guide him in making this determination. Again, he has complete discretion to take into account or reject any elements which he wishes. Thus, executive clemency is a matter of grace which may turn upon any one of a number of fortuitous circumstances. There are no procedural or substantive safeguards to the condemned, and no appeal.

The effect of disqualifying from the jury those with scruples against the death penalty is to deprive the defendant of a fair trial on the issue of guilt. This disqualification arose at a time when conviction meant automatic death. While this harsh result has been abandoned in almost all jurisdictions, the correlative challenge for cause, now outmoded and illogical on the issue of guilt, has been retained.

It has been established that those persons who have no scruples against the death penalty are biased in favor of the prosecution, thus stacking the deck against the accused in the one situation where he has the most to lose. This exclusion of over half of the population precludes the defendant from having his case heard by a cross-section of the community, depriving him of due process of law and an impartial jury.

This is a situation inherently prejudicial to a defendant charged with a capital crime, for which no actual prejudice need be shown.

I.

THE ISSUE AS FRAMED BY THIS COURT MUST BE CONSIDERED IN THE CONTEXT OF THE FACT THAT THE DEATH PENALTY IS WITHERING AWAY EVERYWHERE, EXCEPT IN AUTHORITARIAN COUNTRIES WHERE IT IS USED FOR POLITICAL AND ECONOMIC PURPOSES RATHER THAN FOR MURDER.

On July 23, 1965, President Lyndon B. Johnson established a Commission on Law Enforcement and Administration of Justice, through Executive Order 11236. The Commission had a distinguished membership (pp. 309-311 of its report) and a large staff and it consulted with many persons and agencies having special knowledge (pp. 311-326 of report). It received, as it said, the unstinting assistance of the Federal Bureau of Investigation, the United States Bureau of Prisons, the Department of Health, Education and Welfare, and every other Federal agency it called upon. It, also, had the invaluable assistance of many State, local, and private agencies and groups. It thus had at its service the special talent and knowledge of hundreds of expert consultants and advisers. It issued its report in February, 1967, under the title, *The Challenge of Crime in a Free Society*. One page, 143, in the report sums up the prevailing situation with respect to capital punishment:

> "As the abolition or the retention of the death penalty is being widely debated in the States, it is appropriate to point out several aspects of its administration that bear on the issue.
>
> "The most salient characteristic of capital punishment is that it is infrequently applied. During 1966 only 1 person was executed in the United States; the trend over the last 36 years shows a continual decline in the number of executions, from a high of 200 in

1935 to last year's low of one. Furthermore, all available data indicate that judges, juries, and governors are becoming increasingly reluctant to impose, or authorize the carrying out of a death sentence. Only 67 persons were sentenced to death by the courts in 1965, a decline of 31 from the previous year, and 62 prisoners were reprieved from their death sentences. In a few States in which the death penalty exists on the statute books, there has not been an execution in decades.

"The decline in the application of the death penalty parallels a substantial decline in public support for capital punishment. The most recent Gallup Poll, conducted in 1966, revealed that less than half of those interviewed favored retaining the death penalty. In the last 3 years, 5 states either totally abolished capital punishment or severely limited its use, thus bringing to 13 the number of States which have effectively repealed capital punishment. Great Britain experimentally suspended the death penalty for 5 years in 1965. The trend toward abolition has not been uniform, however. Capital punishment was abolished in Delaware in 1958 but restored in 1961. And in 1966 a constitutional amendment abolishing capital punishment was rejected by the voters in Colorado. In 1965 the Canadian Parliament rejected a move to abolish the death sentence.*

"It is impossible to say with certainty whether capital punishment significantly reduces the incidence of heinous crimes. The most complete study on the subject, based on a comparison of homicide rates in capital and non-capital jurisdictions, concluded that there is no discernible correlation between the availability of the death penalty and the homicide rate. This study also revealed that there was no significant difference between the two kinds of States in the safety of policemen. Another study of 27 States indicated that

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* Subsequently, Canada abolished the death sentence.

the availability of the death sentence had no effect on the rate of assaults and murders of prison guards.

"Whatever views one may have on the efficacy of the death penalty as a deterrent, it clearly has an undesirable impact on the administration of criminal justice. Capital cases take longer to litigate at the trial level; the selection of a jury often requires several days, and each objection or point of law requires inordinate deliberation because of the irreversible consequences of error. In addition, the inherent sensationalism of a trial for life distorts the factfinding process and increases the danger that public sentiment will be aroused for the defendant, regardless of his guilt of the crime charged. This distortion is not restricted to the trial level. As Mr. Justice Jackson noted: 'When the penalty is death * * * [appellate] judges are tempted to strain the evidence and even in close cases, the law, in order to give a doubtfully condemned man another chance.'

"Furthermore, the imposition of a death sentence is but the first stage of a protracted process of appeals, collateral attacks, and petitions for executive clemency. At the end of 1965 there were 331 prisoners awaiting execution in the United States, and since then this number undoubtedly has increased. These prisoners then were under sentence for an average of 30.8 months, and the average time between imposition and execution was almost 4 years. The spectacle of men living on death row for years while their lawyers pursue appellate and collateral remedies tarnishes our image of humane and expeditious justice. But no one seriously proposes to limit the right of a condemned man to have errors at his trial corrected or to obtain the mercy of the executive.

"Finally there is evidence that the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow discriminatory patterns. The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.

"Some members of the Commission favor the abolition of capital punishment, while other members favor its retention. Some would support its abolition if more adequate safeguards against the release of dangerous offenders were devised. All members of the Commission agree that the present situation in the administration of the death penalty in many States is intolerable for the reasons stated above."

The Department of Economic and Social Affairs of the United Nations supports these findings of the President's Commission in its 1967 publication, *Capital Punishment—Developments 1961-1965.*

A few pertinent excerpts follow. First a summary of the basic findings (pp. 3-4):

"(*a*) There is an over-all tendency in the world towards fewer executions. This is the result of less frequent use of the death penalty in those States whose statutes provide for that penalty, and of a steady movement towards legislative abolition of capital punishment.

(*b*) There is a slight but perceptible contrary tendency in the world towards legislative provision for and actual application of the death penalty for certain economic and political crimes.

(*c*) Where it is used, capital punishment is increasingly a discretionary rather than a mandatory sanction.

(*d*) Almost all countries have provision for the exclusion of certain offenders from capital punishment because of their mental and physical condition, extenuating circumstances, age and sex; the scope of the categories of offenders thus exempted is broadening.

(*e*) A growing number of offenders who are sentenced to death are spared through judicial processes or by exclusive clemency.

(*f*) There is a great disparity between the legal provisions for capital punishment and the actual application of those provisions.

(*g*) With increasing frequency, an offender who is sentenced to death is confined, while awaiting execution, in conditions similar to those of other prisoners. Execution, if it takes place, is likely to be accomplished by shooting or hanging and accompanied by a minimum of publicity.

(*h*) The tendency with regard to offenders who are subject to capital punishment but who have been accorded another penalty is to confine them in conditions similar to those of other prisoners and to provide mechanisms for their eventual release.

(*i*) With respect to the influence of the abolition of capital punishment upon the incidence of murder, all of the available data suggest that where the murder rate is increasing, abolition does not appear to hasten the increase; where the rate is decreasing, abolition does not appear to interrupt the decrease; where the rate is stable, the presence of or absence of capital punishment does not appear to affect it."

Then, at p. 20, the report underscores what is generally regarded as established with respect to the uneven application of the death penalty:

"Whether members of minority groups—racial, religious, caste or class—are discriminated against, either in terms of the proportion of death sentences received to the number of capital crimes committed or in terms of the proportion of actual executions to the number of death sentences received, is an important but difficult question and was a subject of some comment in the Economic and Social Council's debates on the Ancel report. Although the data are rare, there is evidence that, in the United States of America and undoubtedly elsewhere, the death penalty is imposed

upon members of racial and religious minorities with a frequency out of proportion to the capital crimes committed by members of such minorities."

With respect to the alleged deterrent value of the death penalty, the report says, at p. 39:

"Examination of the number of murders committed before and after the abolition or reintroduction of the death penalty does not support the theory that capital punishment has a unique deterrent effect. Nowhere has abolition been followed by an otherwise inexplicable rise in the murder rate; nowhere has reintroduction been followed by an otherwise inexplicable decline in the murder rate."

And, again, at pp. 39-40:

"Comparison of the murder rates of abolitionist and retentionist jurisdictions which are geographically, economically, and culturally similar also fails to demonstrate that capital punishment has a deterrent effect superior to that of lengthy imprisonment. Differences among countries frequently make comparison difficult, but where similar jurisdictions can be compared, the murder rates of abolitionist jurisdictions are indistinguishable from those of retentionist jurisdictions. Owing to the relative similarity of cultural, geographic, and economic factors, the experience of certain states of the United States of America is particularly instructive in this regard. The homicide rate of Maine (abolitionist) is very similar to those of New Hampshire and Vermont (retentionist); the homicide rate during the abolitionist period of Kansas was somewhat lower than those of the retentionist states of Colorado and Missouri. From 1950 to 1964 the average homicide rate per 100,000 population in Illinois (retentionist) was 5.3; for that same period in neighboring Michigan (abolitionist), the rate was 4.0. While comparison between nations is more difficult, all the available data suggest that the absence of the death penalty does not affect the homicide rate."

And, finally, on p. 40:

> "Information concerning the effect of capital punishment on the rate of killings of police is similarly limited. None of the presently available data indicates any correlation between the rate of killings of police and the presence or absence of capital punishment."

As to the viewpoint of experts on the subject, the report says, at p. 46: "Among leading authorities in the penal and social sciences, the large majority favours the abolition of capital punishment."

There is a growing literature on the death penalty. Almost without exception, the best minds of our age favor abolition of capital punishment. There are classical studies by Arthur Koestler (*Reflections in Hanging,* Macmillan, 1957) and Albert Camus (*Reflections on the Guillotine,* Knopf, 1961). The matter has been epitomized by James Avery Joyce, a British lawyer and economist connected with the United Nations. In his book, *Capital Punishment* (Nelson, 1961), he says, at pp. 265-266:

> "The rejection of violence as a way of 'life' both for the individual and the nation, has thus become the essential condition of our emergent One World civilization. Unless he can collectively repudiate and replace violence as a means of achieving both social and national defense, Man's continued stay on Planet Earth is open to grave doubt. The issue is as simple as that.
>
> "Because of this fact, the problem of Capital Punishment—already an affront to the individual consciences of millions and millions of ordinary individuals across the earth—has moved into the center of world affairs as the touchstone of human survival itself. That is where we began this book and that is where we end it.
>
> "If, within the United Nations and within each separate nation, the problem of Capital Punishment can

be resolved in terms of the rights of and the dignity due to the living creature whom we call 'Man', there is a real hope for peace and the consequential adjustments in international attitudes which a workable world order requires.

• • •

"The bloody garment of violence covering our common nakedness is too horrible to be mistaken. The hangmen and the missile-men are all of a piece with a doomed society that bases its social defense on the gibbet and gas chamber and its national defense on the launching-pad and Strontium-90. Yet, across the earth, as it has been one of the purposes of these pages to record, men of sense and vision are joining with the Mumfords and Schweitzers and Tagawas and Hammarskjolds to tear down this evil pattern of violence before it becomes humanity's shroud."

II.

THE DISQUALIFICATION OR CHALLENGE OF JURORS BECAUSE OF SCRUPLES AGAINST THE DEATH PENALTY IS UNCONSTITUTIONAL SINCE A SUBSTANTIAL AND GROWING SEGMENT OF ALL AMERICANS, PERHAPS A MAJORITY, IS OPPOSED TO THE DEATH PENALTY.

So far as we have been able to ascertain after diligent search, every reliable poll of public opinion in the United States establishes conclusively that more Americans are now opposed to the death penalty for persons convicted of murder than favor it. Year by year the margin of opposition to the death penalty has increased. The pertinent data appears, among other places, on p. 84 of the Spring 1967 issue of *Polls* (Vol. II, No. 3), "The International Review on Public Opinion" (George Gallup, the best known of American gaugers of public opinion, is a member of the Editorial Board). It appears that, in 1966, 47% opposed the death penalty for murder, while 42% favored

it, and 11% had no opinion. The previous year, in 1965, 45% had favored the death penalty for murder, while 43% were opposed, and 12% had no opinion. In 1960, a majority, 51%, had favored, 36% had opposed, and 13% had no opinion. In 1953, 68% had favored, 25% opposed, and 7% had no opinion. Even in the earlier period when there was the most support for the death penalty, the segment of the population opposed to it was a considerable one (25%). Now it is apparent that as more polls are taken, the American public will register itself increasingly as opposed to the extreme and absolute penalty for murder.

The Gallup Political Index, Report No. 13, June, 1966, at p. 16, analyses the results of the poll of June, 1966, by sex, race, education and other relevant circumstances, as follows. With respect to these results, Gallup International (the copyright holder) observes:

> "*The Sample*: The sampling procedure of the Gallup Poll is designed to produce samples which are representative of the U. S. civilian adult population. National survey results are based on interviews with a minimum of 1,500 adults.
>
> "*Sampling Tolerances*: In interpreting survey results, it should be borne in mind that all sample surveys are subject to sampling error, that is, the extent to which the results may differ from what would be obtained if the whole population had been interviewed. Samples of 1,500 have a tolerance within 3 to 4 percentage points 95 per cent of the time.
>
> "Certain population groups are not reported separately for many surveys because the number of persons in the sample is not enough to provide sufficiently accurate results. An 'x' has been used in the Gallup Political Index to designate such groups."
>
> Question: "Are you in favor of the death penalty for persons convicted of murder?"

	June, 1966		
	Yes, in Favor	No	No Opinion
	%	%	%
National	42	47	11
Sex			
Men	47	45	8
Women	38	49	13
Race			
White	44	46	10
Non-white	x	x	x
Education			
College	46	46	8
High School	41	48	11
Grade School	42	46	12
Occupation			
Prof. & Bus.	43	48	9
White Collar	57	30	13
Farmers	40	44	16
Manual	40	50	10
Age			
21-29 years	40	50	10
30-49 years	43	45	12
50 & Over	43	47	10
Religion			
Protestant	42	48	10
Catholic	44	45	11
Jewish	x	x	x
Politics			
Republican	51	40	9
Democrat	39	51	10
Independent	41	48	11
Region			
East	45	43	12
Midwest	42	48	10
South	35	53	12
West	50	42	8

Income			
$7,000 & over	45	47	8
$5,000-$6,999	41	50	9
$3,000-$4,999	42	40	18
Under $3,000	40	50	10
Community Size			
500,000 & over	43	43	14
50,000-499,999	43	49	8
2,500-49,999	47	44	9
Under 2,500, Rural	39	51	10

By way of a check on the Gallup Poll, we give the results of another poll. Elmo Roper & Associates, another highly reputable agency for measuring public opinion on issues troubling the American people, show somewhat similar groupings on the death penalty. One of their most recent releases on the subject was dated February 9, 1958. (This within months of the commission of the Witherspoon offense.) They phrased the issue as follows:

> "Certain states have abolished the death sentence. Do you think people who have been convicted of the worst crimes, like murder, should be executed, or do you think the heaviest penalty given anyone should be life imprisonment?"

The result:

"For death sentence	—	42%
Against death sentence	—	50%
Express no opinion	—	8%

They commented further:

> "Opposition to the death penalty is strongest among the lower economic groups. Fifty-three per cent at the lowest economic levels oppose it, while its opponents among the higher economic levels are only 42 per cent. The charge has been made that it is the poor and friendless who most often pay the ultimate penalty. A feeling that the better off have a chance

at justice may underlie the attitudes of the lower income groups. This sense of unequal justice may also influence the thinking of Negroes, 78 per cent of whom are opposed to capital punishment. . . .

"Since the United States is basically a strongly humanitarian country, public feeling seems to be turning against the horror of the execution chamber. In a world where death is in far too abundant supply, more and more people are finding it difficult to believe that even legal killing can ever serve the cause of justice and a good society."

One aspect of public opinion has been stressed by Roper more than the other pollsters. It is that in 1958, 52% of the Protestants of this country were opposed to the death penalty, and the percentage has undoubtedly risen as one Protestant denomination after the other has committed itself to opposition to the death penalty. Since the overwhelming majority of this country is Protestant, it would appear that a growing majority, certainly a very sizeable proportion of the population, is being barred from participation in juries in murder cases. This, it seems to us, is unconstitutional in and of itself.

Yet a third poll confirms these observations. In July, 1966, Louis Harris and Associates, Inc., conducted a poll on the attitude of the public concerning crime and criminality in general. One of the questions asked was:

"Some states have abolished capital punishment—executing persons who commit a murder—and have substituted life imprisonment instead. Do you favor or oppose capital punishment?"

The replies to this question were very similar to the results obtained by Gallup and Roper:

	Favor	Oppose	Not sure
	%	%	%
Nationwide	38	47	15
By education			
8th grade or less	32	52	16
High school	28	46	16
College	44	44	12
By size of place			
Cities	37	46	17
Suburbs	48	37	15
Towns	30	56	14
Rural	33	52	15
By sex			
Men	44	43	13
Women	31	51	18

Mr. Harris commented upon these results as follows:

"It is surprising that the less well-educated, more rural and small town resident—women especially—carry the day against capital punishment. The more affluent parts of society, especially among men and suburban dwellers, are more in favor of continuing capital punishment."

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"By 7 to 1, people think prisons should be more corrective than punitive, with heavy emphasis on rehabilitating criminals to re-enter society.

"By 4 to 3, most Americans reach the same conclusion about capital punishment that the Justice Department has."

This poll and the comments thereon indicate that the large majority of persons in this country feel that the purpose of the law is to rehabilitate, rather than punish. Of

course, the death penalty is the very antithesis of rehabilitation.

What is particularly evident in the results of these polls is that the opposition to the death penalty in this country pervades the entire fabric of our society. The total figures showing opposition to the death penalty in our country are not the result of a large imbalance of views in one particular element or area in the country. Whether man or woman, college or elementary school graduate, white collar or blue, metropolitan resident or farmer, easterner or westerner, the opposition to the death penalty is increasingly large. By disqualifying these people from serving on the jury, the Sixth and Fourteenth Amendments are violated.

III.

THE CHALLENGE FOR CAUSE OF JURORS HAVING SCRUPLES AGAINST THE DEATH PENALTY IS UNCONSTITUTIONAL BECAUSE THERE ARE NO LEGISLATIVE OR JUDICIAL GUIDELINES OR STANDARDS BY WHICH TO ASSESS THE DEATH PENALTY, SUCH JURY IS NOT A TRUE CROSS-SECTION OF THE COMMUNITY, AND A DEATH-QUALIFIED JURY IS PROSECUTION PRONE.

Ill. Rev. Stat. ch. 38 sec. 9-1 (1967) defines the offense of murder and lists the possible penalties as death or imprisonment in the penitentiary for an indeterminate term with a minimum of not less than 14 years. If the defendant is found guilty, a death sentence shall not be imposed unless the jury's verdict so provides in accordance with section 1-7 (c) (1) of ch. 38:

> "Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, the jury may return a verdict of death. Where such verdict is returned by the jury, the Court may sentence

> the offender to death or imprisonment. Where such verdict is not returned by the jury, the Court shall sentence the offender to imprisonment."

While the statute requires the explicit agreement of jury and court, no standard is provided for either by which they can determine if the death penalty is proper.* As was stated by the Illinois Supreme Court in *People* v. *Bernette*, 30 Ill. 2d 359, 197 N. E. 2d 463 (1964): "The jury . . . was free to select or reject as it saw fit." Id. at 370.

Ill. Rev. Stat. ch. 38 sec. 1-7 (a)(1967) does provide that the Court may hear evidence in mitigation before deciding if death is proper. Such evidence may concern the "moral character, life, family, occupation, and criminal record of the offender." But nowhere in this statute does a standard appear by which the jury or judge can assess these very vague "mitigating circumstances."

Illinois is not alone in allowing the jury unfettered discretion in deciding whether to impose the death penalty or not. All state legislatures which have not abolished the death penalty have left it the complete discretion of

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* While this is the present situation in Illinois, the law at the time Witherspoon was convicted provided no check upon the jury by giving the judge discretion in sentencing one convicted of murder. The sentence was fixed by the jury alone:

> "Whoever is guilty of murder, shall suffer the punishment of death, or imprisonment in the penitentiary for his natural life, or for a term not less than fourteen years. If the accused is found guilty by a jury, they shall fix the punishment by their verdict; upon a plea of guilty, the punishment shall be fixed by the court."

Ch. 38, § 360, Ill. Rev. Stat. 1959. Then, as now, no guidelines were given the jury in making this awesome decision.

the jury.* There are no explicit standards which can guide the jury. As Kalven and Zeisel state: "The discretion which the jury in the United States is asked to exercise is, it should be emphasized, striking: there is neither rule nor standard to guide it . . ." Kalven and Zeisel, "The American Jury and the Death Penalty," 33 U. Chi. L. Rev. 769, 770 (1966).

New York has limited capital punishment to murder of a police officer or prison guard, N. Y. Penal Code sec. 1045, but even as so limited the jury has complete discretion in deciding whether to impose the death penalty within this class of murders. Some states have classified mur-

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* Ala. Code tit. 14, sec. 318 (1940); Ariz. Rev. Stat. sec. 13-453 (1956); Ark. Stat. Ann. secs. 41-2227, 43-2153 (1947); Cal. Pen. Code sec. 190 (1955); Colo. Rev. Stat. ch. 40, art. 2-3 (1963); Conn. Sta. Ann. sec. 53-10 (1958); Dela. Code Ann. tit. 11, sec. 571 (1953); Fla. Stat. secs. 782.04, 919.23 (1951); Ga. Code Ann. sec. 26-1005 (1953); Idaho Code sec. 18-4004 (1947); Ill. Rev. Stat. ch. 38, secs. 9-1, 1-7(c)(1) (1967); Ind. Ann. Stat. secs. 10-3401, 9-1819 (Burns 1956); Kan. Stat. Ann. sec. 21-403 (1964); Ky. Rev. Stat. secs. 431.130, 435.010 (1948); La. Rev. Stat. tit. 14, sec. 30, tit. 15, sec. 409 (1950); Md. Ann. Stat. Art. 27, sec. 413 (1957); Miss. Code Ann. sec. 2217 (1942); Mo. Stat. Ann. sec. 559.030 (1949); Mont. Rev. Code Ann. sec. 94-2505 (1947); Neb. Rev. Stat. sec. 28-401 (1943); Nev. Rev. Stat. sec. 200.030 (1963); N.H. Rev. Stat. Ann. sec. 585:4 (1955); N.J. Stat. Ann. tit. 2A, ch. 113, sec. 4 (1953); N.M. Stat. Ann. ch. 40A, sec. 29-2 (1953); N.Y. Penal Code sec. 1045; N.C. Gen. Stat. sec. 14-17 (1953); Ohio Rev. Code tit. 29, sec. 2901.01 (1964); Okla. Stat. Ann. tit. 21, sec. 707 (1951); Pa. Stat. Ann. tit. 18, sec. 4701 (Purdon 1963); S.C. Code of Laws tit. 16, sec. 16-52 (1962); Tenn. Code Ann. sec. 39-2405 (1955); Tex. Pen. Code art. 1257 (1961); Wash. Rev. Code. Ann. tit. 9, sec. 9.48.030 (1961); Wyo. Stat. Ann. sec. 6-54; Mass. Laws Ann. ch. 265, sec. 2 (1956); S.D. Code of 1939 (1960 Supp) Ch. 13.20, sec. 13.2012 (1960); Utah Code Ann. tit. 76, sec. 76-30-4 (1953); Vt. Stat. Ann. tit. 13, sec. 2303 (1959).

der by "degrees." But within the highest degree which is punishable by death the jury has no statutory or judicial standard by which it can guide itself. e.g. Ala. Code tit. 14, secs. 314, 318 (1940); Idaho Code secs. 18-4003, 18-4004 (1947); Ind. Stat. Ann. sec. 10-3401 (1956); Mo. Stat. Ann. sec. 559.030; Pa. Stat. Ann. tit. 18, sec. 4701 (Purdon 1963).

It thus appears that the jury is given no statutory or judicial guides. What type of instructions must be given to the jury by the Courts to guide them? There are no Illinois cases on this point but it seems well established in other courts that all that is required is that the trial court must instruct the jury that it has discretion to decide what penalty should be imposed. Failure to so instruct would be reversible error. *Smith* v. *State,* 205 Ark. 1075, 172 S.W. 2d 248 (1943); *State* v. *Wilson,* 151 Iowa 698, 141 N.W. 337 (1913); *State* v. *Christensen,* 166 Kan. 152, 199 P. 2d 475 (1948); *Commonwealth* v. *Madaffer,* 291 Pa. 270, 139 Atl. 875 (1927); *Marshall* v. *State,* 33 Tex. 664 (1871); *Bradshaw* v. *Commonwealth,* 174 Va. 391, 4 S.E. 2d 752 (1939); *State* v. *Chaney,* 117 W. Va. 605, 186 S.E 607 (1936). It is obvious that telling the jury that they have discretion is doing no more than repeating a statute which is itself standardless. It has in fact been held that merely reading or quoting to the jury the statute which grants them discretion is sufficient. *Hernandez* v. *State,* 43 Ariz 424, 32 P. 2d 18 (1934); *Howell* v. *State,* 102 Ohio 411, 131 N.E. 706 (1921).

Assuming that the jury finds the defendant guilty and imposes the death penalty and assuming that the trial judge concurs, what avenues are open to the defendant on appeal? Ill. Rev. Stat. ch. 110A, sec. 615(b)(3) and (4) gives the reviewing court power to reduce the punish-

ment imposed by the trial court.* The statute gives no guidelines to the reviewing court by which to judge the lower court's decision on the penalty.

The Illinois Supreme Court has taken a very limited view of its power under this provision. In *People* v. *Smith*, 14 Ill. 2d 95, 97, 150 N.E. 2d 815 (1958), the Court said a reviewing court should not upset the sentence unless it *clearly appears* that the penalty constitutes a great departure from the spirit of the law or that the penalty is *manifestly in excess* of the prescription of Sec. 2, Art. II of Illinois Constitution which requires penalties to be proportioned to the nature of the offense. In *People* v. *Taylor*, 33 Ill. 2d 417, 211 N.E. 2d 673 (1965) the Court admonished itself to proceed with caution and circumspection in reducing sentences. The trial judge, it observed, has superior opportunity to make a sound determination concerning the punishment to be imposed. In *People* v. *Bonner*, 37 Ill. 2d 553, 229 N.E. 2d 527 (1967) the Court stated that the imposition of sentence was a matter of judicial discretion, and in absence of *manifest abuse* of that discretion it will not be altered by reviewing court. Although these cases were non-capital cases, they demonstrate the reluctance of a reviewing court in Illinois to reduce the penalty imposed by the trial court even though reviewing courts are given that power by statute.

People v. *Dukes*, 12 Ill. 2d 334, 146 N.E. 2d 14 (1957) was a capital case. The Court said that where the charge is murder, a jury has wide discretion in fixing the punishment. It went on to say when the jury in the exercise of

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* This avenue of appeal was not open to petitioner Witherspoon. This power was given to the courts of review for the first time in 1963. (Ch. 38 §121-9(b)(3) and (4), Ill. Rev. Stats 1963)

that discretion inflicts the death penalty, it could not affirm the judgment even though proof of guilt is clear, if prejudicial error occurred in the trial. This seems to give the defendant some protection; but it is protection only from the possibility that the jury may have decided to impose the death penalty because of the prejudicial error. If there were no prejudicial errors, the reviewing court in Illinois would defer to the "wide discretion" of the jury and would not change the penalty. A case in which the Court said it would not reduce the death penalty is *People v Meyers*, 35 Ill. 2d 311, 220 N.E. 2d 297 (1966) *cert. den.* 87 S. Ct. 752, 385 U.S. 1019, 17 L. Ed. 2d 557. The Court characterized the crime as "brutal" and "atrocious" and would not reduce the penalty. Of course, there are no nice murders.

A great number of state courts hold that the jury's determination of punishment cannot be reviewed when the only error claimed is the jury's abuse of discretion. *Catalina* v. *People*, 104 Colo. 585, 93 P. 2d 897 (1939); *Morrow* v. *State*, 168 Ga. 575, 148 S.E. 500 (1929); *State* v. *O'Donnel*, 176 Iowa 337, 157 N.W. 870 (1916); *Spurlock* v. *Commonwealth*, 311 Ky. 238, 223 S.W. 2d 910 (1949); *State* v. *Butner*, 67 Nev. 436, 220 P. 2d 631 (1950); *State* v. *Ames*, 80 N.E. 2d 168 (Ct. App. Ohio 1947); *State* v. *Casey*, 108 Ore. 386, 213 P 771 (1923); *Commonwealth* v. *Neill*, 362 Pa. 507, 67 A. 2d 276 (1949); *Walker* v. *State*, 144 Tex. Cr. R. 329, 161 S.W. 2d 1077 (1942); *State* v. *Lantzer*, 55 Wyo. 230, 99 P. 2d 73 (1940). The Iowa Supreme Court has even said that it would be an unconstitutional delegation of power to review the jury's determination. *State* v. *O'Donnell*, 176 Iowa 337, 345, 157 N.W. 870, 873 (1916).

There are no statutory or judicial guides by which the jury can decide whether or not to impose the death penalty; it has unfettered discretion. The only instruction

that must be given to the jury is one that informs them that they do have this discretion and reviewing courts will defer to the discretion of the jury when considering the propriety of the death penalty. This means that there is nothing to prevent a death-qualified jury from rendering what may be an unreasonable or even savage result. Because there are no legislative or judicial guidelines or standards given to the jury or the judge, and because the jury that is qualified on the death penalty is not a true cross-section of the community and is prosecution prone (as explained more fully in Point V herein), allowing the state a challenge for cause to prospective jurors with scruples against the death penalty violates the accused's right to a fair and impartial jury under the Sixth Amendment and his right to due process of law under the Fourteenth Amendment.

IV.

THE CHALLENGE FOR CAUSE OF JURORS HAVING SCRUPLES AGAINST THE DEATH PENALTY IS UNCONSTITUTIONAL BECAUSE IF AN APPEAL FOR CLEMENCY ARISES, THERE ARE NO LEGISLATIVE OR JUDICIAL STANDARDS RELATING TO THE GOVERNOR'S POWER OF COMMUTATION, THUS MAKING IT IMPERATIVE THAT THE JURY'S VERDICT UPON WHICH HE MUST ACT BE FREE FROM ANY POSSIBILITY OF BIAS OR PREJUDICE, AND THAT THE JURY BE A TRUE CROSS-SECTION OF THE COMMUNITY.

Article 5, sec. 13 of the Constitution of Illinois provides:

> "The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses, subject to such regulations as may be provided by law relative to the manner of applying therefore."

Several Illinois cases have dealt with interpreting the Governor's power of commutation. In *People* v. *Jenkins*, 325 Ill. 372, 156 N.E. 290 (1927), the Lake County state's attorney sought to overturn a commutation of a life sentence (which was the result of an earlier commutation of a death sentence), alleging that the commutation was unauthorized and unlawful. In holding against the state's attorney, the Illinois Supreme Court noted the Governor's constitutional power over judgments of conviction for all criminal offenses, and held that "[h]aving this power by the Constitution, his use of it cannot be controlled by either the courts or the Legislature. His acts in the exercise of the power can be controlled only by his conscience and his sense of public duty." 325 Ill. at 374, 156 N.E. at 291. Moreover, "[t]he only restriction which the Legislature may impose on the Governor's power refers to the regulations relative to the manner of applying for reprieves, commutations, and pardons, and the act on that subject does not purport to and does not, restrict the Governor's authority except to that extent." 325 Ill. at 375, 156 N.E. at 291.

In *People ex rel Brundage* v. *LaBuy*, 285 Ill. 141, 120 N.E. 537 (1918), the Illinois Supreme Court held that Art. 5, sec. 13 vested in the Governor the exclusive power to grant pardons, reprieves and commutations, and struck down a statute which purported to grant to the sentencing judge the power to vacate his order of commitment.

The exclusive discretion of the Governor in matters of commutation, without judicial review or legislative control,

is practically a universal rule. With only one exception,* those courts which have been presented with the issue have held that the actions of the clemency authority are not within the purview of due process, and are not subject to challenge in the courts. *Executive Clemency in Capital Cases,* 39 N.Y.U. Law R. 136, 178 (1964). The Supreme Court of Oregon, in *Eacret* v. *Holmes (Governor),* 215 Ore. 121, 333 P. 2d 741, 744 (1958), held:

> "Where the constitution thus confers unlimited power on the Governor to grant reprieves, commutations and pardons, his discretion cannot be controlled by judicial decision. The courts have no authority to inquire into the reasons or motives which actuate the Governor in exercising the power, nor can they decline to give effect to a pardon for an abuse of power."

As authorities for this general proposition, the Oregon court cited: *In re Opinion of Justices,* 120 Mass. 600 (1876); *State* v. *Harrison,* 122 S.C. 523, 115 S.E. 746 (1923); *Martin* v. *State,* 21 Tex. App. 1, 17 S.W. 430 (1886); *People ex rel. Page* v. *Brophy,* 248 App. Div. 309, 289 N.Y.S. 362 (1936); *Ex parte Grossman,* 267 U.S. 87 (1924); *Jamison* v. *Flanner,* 116 Kan. 624, 228 P. 82 (1924); *Montgomery* v. *Cleveland,* 134 Miss. 132, 98 S. 111 (1923); 16 C.J.S. Const. Law sec. 157, p. 830.

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* In *McGee* v. *Arizona State Board of Pardons and Paroles,* 92 Ariz. 317, 376 P. 2d 779 (1962), the Arizona Supreme Court held that a condemned defendant had a right to, and compelled the board to grant a full due process hearing despite the absence of any constitutional, statutory, or regulatory provision for a hearing. Under the court's construction, the defendant would have to be provided with notice, an opportunity to be heard, and opportunity to present witnesses, and an opportunity to present evidence mitigating circumstances. The court held due process required this result, but nowhere specified whether the federal constitution or the state constitution was the source of this right.

Thus, the Governor has the exclusive power to exercise executive clemency, unfettered by either judicial review or legislative restrictions. Although in Illinois the Parole Board acts as the Governor's agent in hearing applications for executive clemency, ". . . the Board has no power to grant a pardon, reprieve or commutation, but merely to submit a recommendation to the Governor, who is free to accept or reject the recommendation." *People ex rel. Abner* v. *Kinney*, 30 Ill. 2d 201, 205, 195 N.E. 2d 651 (1964).

Although the author of *Executive Clemency in Capital Cases*, 39 N.Y.U. Law Rev. 136, 159-177 (1964), found that clemency authorities sometimes referred to such "standards" as the nature of the crime, fairness of the trial, mitigating circumstances, doubt as to guilt, mental and physical condition of defendant, recommendations of prosecutor and trial judge, and political pressure and publicity, it is plain that these "standards" vague as they are, still cannot be reviewed by a court or imposed by the legislature.

The totally unfettered discretion given to the Governor, although tending to eliminate some of the harshness of capital punishment, has thus resulted in the creation of a system with no standards. In Lavinsky, *Executive Clemency*, 42 Chi-Kent Law Rev. 13, 39 (1965), the author sums up his impression of the decisional system of executive clemency:

> "Interviews reveal a certain dissatisfaction with the decisional soundness of executive clemency. It would seem that much of the clemency process revolves about somewhat unpredictable patterns of interdependent variables. Human factors seem to become mixed with political factors. There is much publicity, public pressure and emotionalism—all of which tend to divert the governor's attention from the merits of the particular

> case. Indeed, clemency decisions in capital cases have been characterized as often 'fortuitous and discriminatory.' [Address by Norval Morris, Chicago Maroon Forum on Capital Punishment (Feb. 18, 1965)]"

Likewise, after a thorough analysis of a substantial amount of data on executive clemency, the author of *Executive Clemency in Capital Cases*, 39 N.Y.U. Law Rev. 136, 177 (1964) concludes that clemency is "a matter of grace." This results in a number of consequences: (1) the clemency authority exercises complete discretion which cannot be challenged in the courts; (2) judicial evidentiary, substantive, and procedural rules do not apply; (3) there is no constitutional right to a clemency hearing or review; and (4) the due process clauses of the 5th and 14th amendments do not apply in full to the clemency system.

The Governor's power to grant executive clemency is exclusive and absolute. There are no standards which either the courts or the legislature can impose on this power. The convicted, sentenced prisoner does not receive the procedural or substantive safeguards guaranteed to him in a court, and there is no way for him to obtain review of the Governor's decision. This means that arbitrariness or unreasonableness upon the part of the Governor may serve to prevent the undoing of an improper result brought about by a death-qualified jury, further reason for constitutional impediment to the challenge under the 6th and 14th Amendments.

Amicus does not argue that the Governor should be limited in exercising his power of commutation. Since he is the last resort open to one sentenced to death, he should have the widest possible discretion in making such a decision. However, since he is a fallible human being like the rest of us, it is even more important that the jury's

finding upon which he must act be completely free from any hint of bias or prejudice.

V.

ALLOWING DISQUALIFICATION OR CHALLENGE FOR CAUSE OF PROSPECTIVE JURORS WHO HAVE SCRUPLES AGAINST THE DEATH PENALTY WHEN AN INCREASING MAJORITY OF THE POPULATION IS OPPOSED THERETO IS A VIOLATION OF DUE PROCESS AND DEPRIVES THE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO AN IMPARTIAL JURY ON THE ISSUE OF GUILT.

In order to appraise properly the challenge of jurors for cause on the basis of scruples against the death penalty, it must be viewed in its proper perspective—a carry-over from an outmoded state of the law which has long since been abandoned by nearly every state in the union. The practice originated when conviction for murder meant a compulsory death sentence. Annotation, 48 A.L.R. 2d 560 (1956). Within the last century, a much more enlightened view has prevailed. "The reversal of civilized opinion on the death penalty during the past century and a half has been truly remarkable. It is an example of law in the process of radical change." Kalven & Zeisel, The American Jury (1966), p. 434.

The change has been brought about by a growing attitude on the part of the American public that the death penalty serves no useful purpose and is to be imposed, if at all, only in the most unusual circumstances. The change from compulsory to discretionary imposition of the death penalty has not been accompanied by a similar enlightened attitude in the manner in which the jurors who are to make this discretionary judgment are chosen.

> "With the humanitarian trend away from capital punishment as a mandatory penalty for certain of-

fenses, there was a broad-scale amending of statutes establishing capital crimes. The pertinent compromise adopted was one of watering down the automatic death sanction to the discretionary variety now in vogue. The discretion was placed in the jury. But the related challenge-for-cause statutory provisions were left in pristine form. The result in most capital jurisdictions is that, while the statute defining the particular crime empowers the jury to mitigate the penalty, the statute disqualifying jurors with scruples against the death penalty still speaks in terms of reservations against *conviction* rather than as to *punishment*. Despite this, the almost universal tendency has been to continue to equate these two issues, to deal with them as one. A juror found to be disqualified on the punishment issue is routinely treated as disqualified on the guilt issue as well. The traditions of the one-issue past, when the possibility of a guilty man going *free* was the vital concern, have thus been carried over to the two-issue present, where this concern no longer exists, with little analytical regard for the intervening refinement of the issues in response to the popular will." Oberer, "Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?" 39 Texas L. Rev. 545, 550-1 (1961) (emphasis in original).

In the majority of jurisdictions, the courts have been too liberal and unrealistic in dismissing jurors who give even a hint of having scruples against the death penalty:

"It is not usually required, for example, that he have a settled conviction against levying the death penalty in *any* case. It is enough that he manifest hesitance as to its application. Such hesitance has been many times held sufficiently prejudicial from the prosecution's standpoint to warrant dismissal of the juror for cause. Where, for example, the juror indicates that he is opposed to capital punishment 'in most instances,' or that he is 'inclined that way,' or that he

might be biased against or hindered in imposing it, or that he is opposed but would 'hang some men,' or where he states that he does not know whether he has such scruples, or that he would be opposed unless there were 'no doubt' in his mind, or unless the evidence were 'very strong' or were other than circumstantial, or unless the criminal responsibility were other than vicarious, the juror has been held properly excused for cause. The same conclusion has been reached where the juror expresses opposition to or scruples against capital punishment but states that he could nonetheless, carry out the law in accordance with the evidence and the instructions of the court." *Id.* at 547-8. (emphasis in original, footnotes omitted).

Two states have stood out valiantly, and we believe properly, against this tide of judicial myopia. In *State* v. *Lee*, 91 Iowa 499, 60 N.W. 119 (1894), the Iowa Supreme Court held it error to allow a challenge for cause to a prospective juror who was opposed to capital punishment. The court said:

> "It cannot be said that the state is entitled to have the punishment by death inflicted in any case. The statute authorizes that punishment, in the discretion of the jury, . . . but the state has no right to a trial by jurors who have no objection against inflicting the death penalty, except as it can secure them by challenging peremptorially those who have such objections."

A similar holding is found in *State* v. *Garrington*, 11 S.D. 178, 184, 76 N.W. 326 (1898), where the South Dakota Supreme Court held:

> "When section 7359 was adopted as section 332 of the Code of Criminal Procedure of 1877, section 6449 contained only these words: 'Every person convicted of murder shall suffer death for the same' . . . then a verdict of guilty necessarily involved the death of the

accused and conscientious scruples against capital punishment precluded a juror from finding a defendant guilty, but as the law now stands, the entertaining of such opinions does not have that effect, and is not cause for challenge."

It is submitted that the attitude of these two courts is the only one consonant with the requirement of the Sixth and Fourteenth Amendments that the accused be given a trial by an impartial jury. In Illinois, as well as in all other states in which the death penalty is not mandatory, the jury has complete discretion in reaching its decision. As is noted elsewhere in this brief, there is not one single guideline for the jury to follow in deliberating upon whether to recommend the supreme penalty of death. This means that the jury is completely unfettered in reaching its decision. The reasons for the decision are unchecked and may not be inquired into. Having been left with nothing to guide them, it is particularly crucial that the jury be impartial.

This is the point at which the courts and commentators find their greatest difficulty. What constitutes partiality? Some courts have assumed, in allowing challenges for cause against those having scruples against the death penalty, that those having such scruples will automatically favor the accused. Thus, in *People* v. *Hobbs*, 35 Ill. 2d 263 (1966), the Illinois Supreme Court rejected defendant's argument for a jury including people having scruples against the death penalty as asserting a "right to have some individuals on the jury who may be prejudiced in his favor, someone who is unalterably opposed to one of the possible penalties with which he is faced." *Id.* at 272.

But what relationship should there be between the issues of guilt and punishment? Clearly, the two issues are to

be separated. In almost every other instance they are separated. The basic and most important issue, which must be confronted first is the issue of guilt. No consideration of the possible punishment to be imposed, once guilt has been determined, should intrude upon the jury's deliberations upon this issue. This was the very reason for allowing the jury discretion in imposing the death penalty. Too many juries were acquitting obviously guilty defendants charged with crimes carrying a mandatory death sentence, not because they felt that the defendant was innocent, but because they felt that the death penalty should not attach. Therefore, discretion was given to disassociate the issue of guilt from the punishment to be imposed.

The assumption that jurors who have scruples against the death penalty will be biased in favor of the defendant on the issue of guilt is no more logical than the proposition that jurors who have no scruples against the death penalty will be biased in favor of the prosecution on the issue of guilt. As a matter of fact, it has been shown that jurors who are in favor of the death penalty are in fact prosecution prone. Professor Hans Zeisel has written, in "Some Insights into the Operation of Criminal Juries" (1957) (unpublished):

> "In the course of our investigation of Special Jurors [in New York], we found the following relationship between attitude towards the death penalty and prosecution proneness:
>
> | "Scruples Concerning Capital Punishment | Prosecution Proneness |
> |---|---|
> | None | 54 |
> | Some | 52 |
> | Major | 42 |
>
> "These figures indicate that jurors who have no scruples against the death penalty are about 28

percent more prosecution prone than those who have major scruples against it (.54 over .42 = 1.23).

"This constitutes a major, if subtle, argument against capital punishment along these lines: The present practice is to admit only such jurors to a capital case who have no scruples concerning the death penalty. But by setting this limitation, the defendant's chances of being acquitted are adversely affected. The probability of his being found guilty by jurors who have no scruples against the death penalty is 28 percent greater than if he were judged by jurors who do have such scruples.

"The point, of course, is that this difference is not due to the fact that the one type of juror does not mind if a guilty murderer is executed, while the other does, but rather that the jurors who are for the death penalty happen also to be more prosecution prone than the jurors who are against it.

"It must be remembered that our measure of prosecution proneness is derived from votes on *all* kinds of cases of which only one percent were actually capital cases.

"The ideal, if only hypothetical solution, of this difficulty would be to leave the jury ignorant of the possibility that a guilty verdict might result in the defendant's execution. In that case, it would not be necessary to select only jurors who have no scruples aaginst the death penalty.

"Barring this unrealistic possibility, one might wonder whether it would indeed be inadvisable to admit also such jurors to capital cases who had scruples against the death penalty.

"One could hardly see this done where a guilty finding on the major charge makes the death

> penalty mandatory. In such a case, a juror with scruples against the death penalty might be tempted to acquit merely because of his scruples."

As further support for this proposition, attached hereto, as Appendix A, are pertinent excerpts from an unpublished paper entitled, "Belief in Capital Punishment and Jury Performance," by W. Cody Wilson of the University of Texas.

Professors Kalven and Zeisel are now in the process of completing a more comprehensive study to determine whether jurors qualified for the death penalty are prosecution prone. This study may be completed by the time oral argument is heard in this case. There is no reason to believe that this study will not support and reinforce the present data showing that death qualified jurors are in fact prosecution prone.

> "Persons opposed to capital punishment form a sizeable and definite class in our society, and those in favor of capital punishment are actually in the minority. Of the people in favor of capital punishment, many do not like the idea of having anything to do with it themselves. (Wiehofen, The Urge to Punish, 168 (1956)) Can it be said then that a jury composed of such a class of persons, who are in a minority in our society and who may tend to more quickly find a criminal defendant guilty on less evidence, does not deprive that defendant of due process of law?" Note, Challenge for Cause, 45 North Carolina L. Rev. at 1073-4(1967).

The consequence is that a jury qualified on the death penalty will necessarily have been culled of the most humane of its prospective members:

> "And when it is further considered that the issue of guilt or innocence in the less important cases—the

non-capital cases—is determined by a jury not similarly shorn of its most humanely-disposed constituents, the result becomes even more ironic: *the graver the charge the less the protection accorded the accused.*" (Oberer, *supra*, at 549) (emphasis in original).

The result of the Illinois statute is to exclude purposefully from the jury those jurors who will balance and check the tendencies of those who are prosecution prone. This brings us back to the issue of what constitutes an impartial jury. It becomes increasingly clear that it is impossible to find the elusive "impartial juror," much less twelve of them, in a capital case where so much rides upon their decision. The answer then becomes clear: the only way in which a person accused of a capital crime may obtain a fair trial is to have an impartial *jury* chosen without inquiry as to whether they do or do not have scruples against the death penalty. This is the only way the defendant will be assured of due process of law.

It is indeed ironic that the State of Illinois has taken that one institution which we have always regarded as a prime safeguard of the rights of an accused, the jury, and twisted it into a device which is stacked against the defendant from the outset. Illinois has granted jurors discretion on the imposition of the death penalty, but by precluding from jury service those who have scruples against this penalty, it has granted the jurors only discretion to impose the death penalty, not to refuse to do so.

This is a calculated scheme to deprive the defendant of his right to a trial by a fair cross-section of his community. Of course this does not mean that he has an affirmative right to have someone opposed to the death penalty on his jury, but it does mean that he has the right not to have these people excluded, particularly where they form almost half of the population, and more in some areas.

This court has consistently recognized that the purposeful exclusion of portions of the community without a rational excuse therefor is anathema to our system. In *Thiel* v. *Southern Pacific,* 328 U.S. 217, 220 (1946) this Court said:

> "The American tradition of trial by jury, considered in connection with either civil or criminal proceedings necessarily contemplates an impartial jury drawn from a cross-section of the community. . . . This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury."

Again, in *Ballard* v. *U.S.,* 329 U.S. 187, 195 (1946) this Court said:

> "But reversible error does not depend on a showing of prejudice in an individual case. The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. . . . The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the process of our courts."

Once again, in *Glasser* v. *U.S.,* 315 U.S. 60 (1942), at p. 86, this Court stated:

> ". . . the proper functioning of the jury system and, indeed our democracy itself, requires that the jury be a body truly representative of the community and not the organ of any special group or class. . . . Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may, one by one, lead to impairment of substantial liberties."

The foregoing facts have shown conclusively that by excluding from the jury those who have scruples against the death penalty, a substantial portion, a growing majority, of the community is excluded from sitting on a jury where this sentence is a possibility. This violates the Constitution in the most flagrant manner.

Fay v. *New York,* 332 U.S. 261 (1947) is not to the contrary, as it was based upon a failure to prove that the special jury there dealt with was prejudicial to the defendant. Since that time, the evidence that prejudice must necessarily result in a case such as this has become conclusive.

The effect of this practice is well expressed by Oberer, when he states:

> "A prime value, as I see it, of jury trial in criminal cases is to bring the conscience of the community to bear upon the issues presented. In this fashion, contact between the people and the law is maintained. This contact is of compelling importance in maintaining the respect for the administration of justice so vital to a free society. What is the effect, viewed in

this context, of the disqualification for cause by reason of scruples, broadly defined, against the death penalty? Does this not operate *against* bringing the community conscience to bear on the primary guilt issue, as well as the punishment issue in the most crucial of cases? Might not a minority point of view be imposed through the death-qualified jury?" (Oberer, *supra,* at 555) (emphasis in original).

Oberer's comments have been borne out by experience and the various studies which have been conducted on this subject. It is a minority viewpoint, hostile to the accused, which is represented by a jury which has been qualified on the death penalty. Oberer continues:

"... the gulf between the community and the death qualified jury grows as the populace becomes the more infected with modern notions of criminality and the purpose of punishment. Accordingly, the community support for the death verdict becomes progressively narrower, with all that this connotes for the administration of justice. Moreover, as the willingness to impose the death penalty—that is, *to be sworn as a juror in a capital case*—wanes in a particular community, the prejudicial effect of the death-qualified jury upon the issue of guilt or innocence waxes; to man the capital jury, the resort must increasingly be to the extremists of the community—those least in touch with modern ideas of criminal motivation, with the constant refinement of the finest part of our cultural heritage, the dedication to human charity and understanding. The due-process implications of this flux seem obvious. Yesterday's practice becomes less and less relevant to today's problem." (Oberer, supra at 556-7) (emphasis in original)

There is one aspect of *Fay,* however, which must be re-examined by this court. In *Fay,* it was held that the defendant must prove prejudice to him as a result of the exclusion of jurors. This no longer comports with the approach taken by the Court to issues as basic as this. The

new and more correct attitude is shown in *Estes* v. *Texas*, 381 U.S. 532, 85 S.Ct. 1628 (1965), where Justice Clark stated on behalf of the court:

> "... this Court itself has found instances in which a showing of actual prejudice is not a prerequisite to reversal. . . . It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process. Such a case was *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955), where Mr. Justice Black for the Court pointed up with his usual clarity and force:
>
> > 'A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the *probability* of unfairness.* * * [T]o perform its high function in the best way "justice must satisfy the appearance of justice." *Offutt* v. *United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13 [99 L.Ed. 11].' At 136, 75 S.Ct. at 625. (Emphasis supplied by the Court.)

And, as Chief Justice Taft said in *Tumey* v. *State of Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749, almost 30 years before:

> 'the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a *possible* temptation to the average man * * * to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and accused denies the latter due process

of law.' At 532, 47 S.Ct. at 444. (Emphasis supplied by the Court.)

"This rule was followed in *Rideau* [v. *State of Louisiana,* 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed. 2d 663 (1963)], and in *Turner* v. *State of Louisiana,* 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed. 2d 424 (1965). In each of these cases the Court departed from the approach it charged in *Stroble* v. *State of California,* 343 U.S. 181, 72 S.Ct. 599, 96 L.Ed. 872 (1952), and in *Irvin* v. *Dowd,* 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), where we made a careful examination of the facts in order to determine whether prejudice resulted. In Rideau and Turner the Court did not stop to consider the actual effect of the practice but struck down the conviction on the ground that prejudice was inherent in it. Likewise in *Gideon* v. *Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), and *White* v. *State of Maryland,* 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963), we applied the same rule although in different contexts." Id. at 542-4.

In the same line, see *Sheppard* v. *Maxwell,* 384 U.S. 333, 86 S.Ct. 1507 (1966).

This is one of the cases which fits into the category where the practice of the State is so fraught with danger to the defendant that no actual prejudice need be shown before this court will hold that he has been denied due process. The disqualification of the most humane half of the prospective jurors in the community, leaving the defendant to the not too tender mercies of a minority biased against him, can only place the defendant at an insuperable disadvantage. The fact that this is done only in those cases where the supreme penalty may be imposed makes it doubly obnoxious. For these reasons, anything in *Fay* which is contrary hereto should be overruled.

The only safeguard, then, against arbitrariness is to declare that, as a matter of constitutional necessity, no

challenge for cause may be exercised against a juror having scruples against the death penalty.

CONCLUSION

Long after everyone ceased to believe in witches, the laws which had brought death to many of our ancestors remained on the statute books in colonial America, as if to remind us, as Lincoln knew, that we must disenthral ourselves. In the same way, the challenge "for cause" of jurors who have scruples against the death penalty remains in effect although, at this stage of our history, it is an unconstitutional impediment to a fair and impartial jury in murder cases and a denial of due process. Fewer and fewer people believe in the death penalty—the majority are against it; less and less is it imposed either by courts or juries; even less is it carried out. In essence, the death penalty itself and particularly the challenge of jurors with scruples against it create an unconscionable lottery in which a few unlucky persons, no worse than others except for the fortuitous circumstances of race, education and financial standing, receive the extreme penalty. Because such challenge affronts the conscience of America and for the other reasons set forth hereinabove, this court should declare the challenge of jurors with such scruples to be unconstitutional and the petitioner William Witherspoon, a victim of the exercise of the challenge, should be granted a new trial.

Respectfully submitted,

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